After Article 50 and Before Withdrawal: Does Constitutional Theory Require a General Election in the United Kingdom Before Brexit?

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I. Introduction: Parliamentary Sovereignty vindicated, but only for now?

On the 24th January 2017, the United Kingdom Supreme Court delivered its judgment in the Miller appeal. The comprehensive majority judgment is surely set to become a seminal (re)statement on the nature of the United Kingdom's constitution. Despite the media storm surrounding the High Court judgment which it upheld, the Supreme Court decision can be regarded as an entirely constitutionally orthodox judgment. Faced with the UK Government's argument that it had the executive authority to use the ancient and residual prerogative power to withdraw from the Foundational Treaties of the European Union, the Supreme Court held that such a transformative constitutional action could only be carried out by Parliament. This is because it is has been established constitutional doctrine since the 17th century that only Parliament may change the "law of the land" through the exercise of its legislative sovereignty.

Accordingly, following lively debate and the 'ping-ponging' of the Bill between the House of Commons and the House of Lords, the European Union (Notification of Withdrawal) Act 2017 received the Royal Assent on 16th March 2017. The UK Government resisted numerous amendment proposals – including amendments regarding the rights of EU citizens in the United Kingdom and providing Parliament with a vote on the terms of the withdrawal treaty which had been passed by the House of Lords. Now fully-licensed with the means to pull the Article 50 trigger, the Prime Minister Theresa May has set 29th March as the date of notification to the European Council.

In vindicating the constitutional principle of Parliamentary Sovereignty, the Supreme Court refused to recognise that the result of the EU referendum of 23rd June has any legal significance. Despite this, this post will suggest that the referendum result is a constitutional irritation in the United Kingdom, occupying a place in the grey area between a purely political and legal nature. It will be suggested that this is because, for the first time in the United Kingdom's constitutional history, the referendum has opened up a powerful new source of popular sovereignty as a social fact, which has come into conflict with the orthodox principle of Parliamentary Sovereignty as a legal fact. Indeed, if the Court had indeed recognised the legal validity of the referendum, this would have been a far more revolutionary act than the validity that has been accorded to the source of EU law, and would arguably have altered the Rule of Recognition of the UK legal system.

This post will conclude that it is necessary for the constitutional integrity of the United Kingdom that this new stream of popular social legitimacy is realigned with the existing stream of Parliamentary Sovereignty. It is argued that the most effective and desirable way in which to achieve this would be for a General Election to take place. Already one month after the vote, Kenneth Armstrong had argued for why a General Election would be desirable before the notification of withdrawal. Such an event seems incredibly unlikely now that the date for triggering has been set. Nevertheless, this post will submit that a General Election would still be desirable and could still be practicable before the withdrawal treaty with the European Union comes into effect. This would ensure that the constituent members of the sovereign Parliament are truly representative of the constituent members of the (socially) sovereign people and that their views on the fundamental constitutional reform of Brexit align. If not, the clash between Parliamentary and popular sovereignty could necessitate a reformation of the United Kingdom's existing constitutional settlement.

II. The status of the referendum in Miller: A new source of popular sovereignty?

The majority judgment in Miller took a rather curt view of the nature of the referendum as a purely political rather than legal act. Consistently with the emphasis on parliamentary sovereignty in the judgment, the majority outline at paragraph 118 that "[t]he effect of any particular referendum must depend on the terms of the statute which authorises it". They detail in the following paragraph that the 2015 Act which authorised the referendum on membership of the European Union did not make provision for any consequences of either a remain or leave vote. Therefore, paragraph 125 concludes on the point that "unless and until acted on by Parliament, its force is political rather than legal". Indeed, in a rather embarrassing turn for the appellant in the case, the judgment corroborates its conclusion by quoting the UK government's response to a House of Lords Select Committee report on referendums: "Under the UK's constitutional arrangements Parliament must be responsible for deciding whether to not to take action in response to a referendum result". Thus, for the purpose of UK constitutional law as proclaimed by the Supreme Court, the legal status of the referendum result is purely advisory.

The Supreme Court's dicta that "where…implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation" (para.121) upholds the constitutional orthodoxy in the United Kingdom regarding the sources of law. Indeed, it is the government's submission that, if followed, would have provided a radical shift in the rule of recognition of the United Kingdom legal order. The Attorney-General argued that "the response to the referendum result should be a matter for ministers, and that it should not be constrained by the legal limitations which would have applied in the absence of the referendum" (para. 116). This submission may have been limited to the circumstances of the EU referendum. But if given general applicability, this argument would authorise the executive to create, amend, and repeal law on the basis of exercises of popular will thus bypassing the sovereign Parliament.

Arguably, the dissenting opinion of Lord Reed would also have to rely on such a construction. Although at paragraph 171 he states that it is not the appropriate occasion to consider the implications for UK constitutional law of the developing practice of holding referendums, at paragraph 214 he positively cites Lord Dyson MR's dicta in Shindler to conclude that Parliament, through the 2015 Act, made the holding of a referendum part of the process of taking the decision to withdraw under Article 50(1) TEU. As the majority judgment outlines at paragraph 91, if the government and Lord Reed's conclusion that prerogative powers could be used to give notification to withdraw from the European Union were followed, this would lead to the "implausible propositions" that prerogative powers could have been used in relation to the EU Treaties at any time after the European Communities Act 1972 came into force. Therefore, ministers could have given notification to withdraw under Article 50 in the absence of a referendum or indeed even if any referendum had resulted in a vote to remain. Beyond arguing that the only constraints on the executive were political, the only way that Lord Reed could counter such an accusation would be through concluding that a referendum result to leave is not only part of the 'constitutional requirements' for withdrawal, but indeed the crucial necessary condition.

Such a direct connection between the democratic will expression of the electorate and the executive in the creation and amendment of domestic law is alien to the United Kingdom constitution. Sovereignty for the purposes of the creation and amendment of law has never vested in the people. Instead, through a gradual process of incremental reform, it has slowly been dispersed from one absolutely sovereign monarch to the assembly of elected representative Members of Parliament in the House of Commons, and the appointed Members of the House of Lords. Indeed, in formal constitutional terms, the Queen is still sovereign and politicians in Parliament and in government act as her representatives. Practically, this vests itself in the requirement that for Bills passed by both chambers of Parliament to come into force, they must receive the Queen's Royal Assent. As the majority judgment outlines at paragraph 80: "One of the most fundamental functions of the constitution of any state is to identify the sources of its law". Simply put, the United Kingdom's unwritten constitution does not identify nor recognise referendums as a source of law, and their effect can only ever be legal if mandated by an Act of Parliament. The Supreme Court outlines at paragraph 60 that they do not regard that the "so-called fundamental rule of recognition",

first delineated in The Concept of Law by H.L.A Hart, has been changed by the empowerment of norms deriving from the European Union in the United Kingdom constitutional order. On the other hand, if the Supreme Court had accepted the government's argument that an executive decision could be taken which would drastically alter domestic law on the basis of a popular vote, then this would indeed alter the rule of recognition through the identification of a new source of law.

The Miller judgment's rather robust interpretation of the referendum result does not provide a satisfactory resolution of its strange legal status. Lord Reed's judgment provides a hint towards the constitutional irritation called by what Mike Gordon refers to as a feature "unusual" to the UK constitution: "Nor is this an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional change" (para. 171). As this post is unconstrained by the judicial need to address the argumentation of advocates, I will submit that the implications of such fundamental referendums open up a new source of popular sovereignty as a social fact in the United Kingdom. Referendum results are not (yet) recognised as legal facts as they do not fall within the sources as identified by the rule of recognition. However, they may be regarded as quasi-legal in the sense that the strong political influence they exert has a compelling effect on the creation of law by Parliamentarians, and thus may be regarded as a bind on the exercise of parliamentary sovereignty. The extent to which this "will of the people" has bound the sovereign legislators has been evidenced by the repeated mantra of the government of its need to give effect to the referendum result. Indeed, it may be argued that Theresa May is using the referendum result as the de facto legitimating mandate for her policy program as Prime Minister with complete disregard for the de jure 2015 General Election manifesto. For example, the claim, if not promise, in the manifesto that "We say: yes to the Single Market" seems to have been wilfully ignored in the Prime Minister's negotiation strategy.

Concordant with Parliament's empowerment over the last centuries, the will of the people has been expressed through the representative channels of the Members of Parliament that they elect. The bypassing of Parliament through the executive taking an issue directly to the electorate breaks this chain. The will of Parliamentarians and the will of the people may not co-align. This tension which is resolved in constitutional orthodoxy through the capacity for individual voters to change their Parliamentarians at General Elections – to "kick the buggers out". It is submitted that in the absence of this capacity following a referendum result with which Parliament disagrees, the new stream of popular sovereignty and the old stream of parliamentary sovereignty may come into conflict with the potential for great constitutional crisis if not resolved. Accordingly, in the following section, this post will consider whether the passing of the European Union (Notification of Withdrawal) Act has been sufficient to alleviate this tension and re-align the streams of popular and parliamentary sovereignty.

III. The European Union (Notification of Withdrawal) Bill 2017: A sufficient realignment?

As prescribed by the Supreme Court, the government submitted the two-clause Bill to Parliament two days after the Miller judgment. The entire substance of the Bill is that: "(1)The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU. (2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment". If one takes for granted that this fulfils the constitutional requirements for withdrawal, which has been challenged by an argument dubbed the "Three Knights' Opinion", then the question arises of whether this Act is sufficient to realign the streams of parliamentary and incipient popular sovereignty. Formally, the answer could be yes. Parliament, in full exercise of its sovereignty, has decided to imbue the executive with the power to give effect to an expression of popular will as exercised in a referendum.

In practice, however, it may be argued that the means by which the Act was passed provided only a meagre shadow of the sovereignty of parliament (if such a notion truly exists in practice beyond the dicta of the courts). The Bill was greeted with a great quantity and quality of debate in both Houses of Parliament. However, the railroading of the Bill through both Houses by the government turned the legislature into little more than a debating chamber. The

numerous amendments proposed to the Bill from across party lines were rejected by the government and eventually voted down as a result of its insistence on party discipline through the whip system. Indeed, such a feature of legislative practice means it may be argued that parliamentary sovereignty is only worth as much as the policy line of the ruling party. Perhaps most egregiously, the two amendments passed by the House of Lords were similarly disregarded by the government and were eventually rejected in the final reading of the Bill by the Commons. Indeed, the House of Lords Constitution Committee has expressed its concern over the expediency of the procedure used for the passage of the Act: "We note, however, that fast-tracking a Bill of such constitutional significance is an exceptional procedure. This occurrence ought not to be used as a precedent in relation to future measures of constitutional significance, such as the 'Great Repeal Bill' and other Brexit-related legislation."

The Select Committee recognised the political imperatives behind the decision to fast-track as outlined in the government's explanatory notes to the Bill; however, such imperatives were complete constructions by the government. The arbitrary deadline of the end of March 2017 to trigger Article 50 was self-imposed by Theresa May at the Conservative Party conference in October. Perhaps most flagrantly, the government refers to the "additional (and unexpected) step" required by the Supreme Court judgment of introducing the Bill before the process of withdrawal could commence. This ignores that a Bill could have been introduced after the High Court's original judgment in October which was upheld by the Supreme Court. Thus any delay in the process is entirely the result of the government's unsuccessful attempts to bypass Parliament through appealing the result. The upshot of the fast-tracking of the European Union (Notification of Withdrawal) Act 2017 has been selective rebellion by Members of Parliament, the resignation of shadow cabinet members, and the firing of a House of Lords Peer as a government advisor. It is hard to regard the passage of the Act as an uninhibited exercise of Parliamentarians voting on their consciences in their role as representatives of their constituencies; instead it resembles a rubber-stamping of government policy promulgated on the legitimating basis of an assumed will of the people. Rather than sovereignty, Members of Parliament have been held to ransom through fear both from their party bosses above, and the electorate below. As such, it may be concluded that rather than realigning the streams of parliamentary sovereignty and popular sovereignty, the passage of the Act has seen the subsumption of the former by the latter.

IV. Conclusion: A General Election or a Constitutional Resettlement

As long as there are Parliamentarians whose mandate from their constituencies clashes with the supposed popular sovereign will expressed in the referendum result, the new stream of popular sovereignty and the old stream of parliamentary sovereignty will remain in tension. Arguably, there are only two ways to resolve this clash: the holding of a General Election which will ensure the resetting of the channel between the will of the people and their representatives in Parliament, or a fundamental resettlement of the constitution to officially recognise the new source of popular sovereignty. Kenneth Armstrong argues that triggering Article 50 required "a wide-ranging political conversation and a contest over the future of the UK's relationship with the EU. In the UK's constitutional system that can only be achieved through a general election". Unfortunately, it seems that the opportunity for such representative will formation on the shape of the withdrawal negotiations will now be impossible before the notification of withdrawal next Wednesday.

However, I would still conclude that for the sake of the overall stability of the United Kingdom's constitutional settlement, rather than just consensus on the single-issue of the shape that Brexit will take, such a General Election would still be desirable. The changes of the political winds during the next two turbulent years of negotiation are unforeseeable. However, even if an early election, which is more difficult to achieve since the passage of the Fixed-term Parliaments Act 2011, is not held it may be desirable to seek an extension from the European Council under Article 50(3) TEU of the negotiation period in order to allow the final terms of the withdrawal treaty to go before the electorate in the 2020 General Election. Indeed, even if such an extension were not granted, the two-year period only refers to the conclusion but not the ratification of the withdrawal treaty. Thus, there could still be the opportunity for the popular sovereign will and parliamentary representation to be realigned before the Treaty comes into force and the United Kingdom's membership of the European Union is finally terminated. Otherwise, the cleavages caused by Brexit and the disconnect between the people and their representatives in Parliament may require the

United Kingdom’s delicate unwritten constitutional arrangement to finally be explicitly reformulated. With the exacerbating factor of the resurgence of the issue of Scottish independence, the tide may turn towards the recent proposals for the creation of a federal state which could finally recognise popular sovereignty of the individuals who form its constituent parts.

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